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February 27, 2002

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Notification
GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Caton:

On Tuesday, February 26, 2002, Michael Willner, President and CEO of Insight Communications Corporation ("Insight"), Colleen Quinn, Senior Vice President, Corporate Relations, and Seth A. Davidson, counsel for Insight, had separate meetings regarding the above-referenced proceeding with the following Commission personnel: Commissioner Kathleen Q. Abernathy along with Stacy Robinson and Jennie Berry from her staff; Susanna Zwerling (Office of Commissioner Copps); Catherine Crutcher Bohigian (Office of Commissioner Martin); and Susan Eid (Office of Chairman Powell).

During these meetings, Insight urged that the Commission resolve the pending inquiry in a manner that provides certainty and clarity with respect to the regulatory classification of cable modem service and the regulatory implications of the selected classification. In particular, Insight focused on the need for a continuation of the Commission's marketplace-oriented policy regarding the offering of multiple ISPs over cable modem platforms and for clear statements by the Commission restraining state and local regulation of cable modem service should it be classified as an "information service." Insight also discussed the possibility that a determination that cable modem service is an "information service" will trigger class action lawsuits seeking

recovery of franchise fees collected by cable operators who, in good-faith, treated cable modem service as a "cable service" pending resolution of this proceeding. In addition to endorsing comments encouraging the Commission to clarify that cable operators are not subject to retroactive refund liability for previously-collected franchise fees on cable modem service, Insight suggested that the Commission reconfirm that disputes arising out of the inclusion of particular cost elements in subscriber rates are rate regulation matters subject to review only by local franchising authorities and/or the Commission pursuant to the Commission's rules and procedures.

Included with this letter is a written outline of Insight's presentation, along with other documents provided to the participants in each meeting. Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and the attachments thereto are being submitted to the Secretary's office for inclusion in the record of the above-referenced proceeding and a copy is being provided to each of the participants in the meetings. If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,

Seth A. Davidson

cc: Commissioner Kathleen Q. Abernathy
Stacy Robinson
Jennie Berry
Susanna Zwerling
Catherine Crutcher Bohigian
Susan Eid

143527

TALKING POINTS: CABLE MODEM NOI

- **Regulatory Classification**

  Need for certainty.

  A " tentative conclusion" that cable modem service is an "information service" that fails to recognize the interstate character of the service and the need for national uniformity will only fuel the regulatory uncertainty that has hampered deployment to date.

  Further Notice should be avoided.

- **Framework of any Further Notice**

  National policy should be to "promote competition, deregulation and innovation wherever possible in the communications market."

  Tentative conclusions.

    Any unresolved issues should be accompanied by tentative conclusions to provide focus to policy debate.

  Interim freeze on state/local regulation of cable modem service.

    Burden should be placed squarely on those seeking to impose state or local regulation on this highly competitive service.

    Pending the resolution of any Further Notice, the FCC should impose a freeze on any state or local regulation of cable modem service.

    If market failures requiring state or local regulation are demonstrated, the freeze can always be lifted, while not impeding deployment of cable modem service in the interim.

- **Regulatory Implications**

  The Commission should assert its plenary jurisdiction over cable modem service.

  Nationwide application of federal policies.

  Implement Congressional intent to prevent burdensome regulations and spur deployment.

    No "Forced" access.

No local franchise requirement or other entry barriers.

No additional franchise fees or right-of-way payments.

No other local obligations under cable service model.

- - Free service to local agencies.

- - Rate regulation.

- - Build-out timetables (especially in renewals).

- - Customer service.

- - Performance standards.

- **Provision of "information service" does not change the nature of a "cable system" facility**

Gulf Power – A cable system that provides information service is still a cable system.

Title VI expressly permits cable systems to provide information services in addition to cable service.

> H. REP. 98-934, 98th Cong., 2d Sess. 44 (1984) ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose. . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.")

LFAs are expressly forbidden from regulating information services on cable systems.

> § 544(a) (franchising authorities "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI").
>
> § 544(b)(1) (franchising authority may not "establish requirements for . . . information services").

No franchise may overrule existing federal law.

> § 541(a)(2) ("any franchise shall be construed to authorize the construction of a cable system over public rights-of-way," without limitation on the services to be provided).
>
> § 541(b)(3) - - If Congress did not intend to require cable operators to obtain an additional local franchise in order to provide telecommunications service, then no such requirement should apply to information services either.

Recognition that adding an information service to a cable system does not create new franchising requirements is also consistent with:

> The policy of Section 706, expressing Congressional intent to encourage broadband deployment.
>
> § 230(b)(1),(2) -- Congressional directive to avoid regulation of the Internet.
>
> Need to treat information service providers equally.

143499.1

Federal Communications Commission
Washington, D.C. 20554

September 17, 1997

DA 97-1995
CSB-ILR 97-8
Released: September 18, 1997

Comcast Cable Communications, Inc.
c/o Thomas R. Nathan, Esq.
Vice President/General Counsel
1500 Market Street
Philadelphia, Pennsylvania 19102-2148

Dear Mr. Nathan:

This is in response to your letter of September 9, 1996. According to your letter, a number of class-action lawsuits have been filed against cable systems owned by Comcast in the state courts of Florida and Alabama, alleging that the company has overcharged subscribers by miscalculating the amount of franchise fees that may be passed through to each subscriber.[1] You seek guidance on whether the issues in these suits are matters of cable television rate regulation subject to the statutory and regulatory rules and procedures for the resolution of such issues. Although copies of your letter were served on counsel of record in the State cases, the Commission has received no reply to your letter.

You contend that the lawsuits allege that the company's rates, which include the franchise fee as an itemized pass-through, violate state common law and seek remedies for the alleged violations apart from whether the charges violate Title VI of the Communications Act or any pertinent FCC rule. You state that the lawsuits do not contend that the alleged overcharges violate Title VI of the Communications Act or any pertinent FCC rule. What the lawsuits allege, according to your letter, is that the company's rates, which include the franchise fee as an itemized pass-through, violate state common law. You ask for confirmation that under the Communications Act and the Commission's rules a party wishing to challenge the propriety of a pass-through of a franchise fee in subscribers' rates may do so only pursuant to the Commission's rate regulation rules.

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[1]Olensky v. Comcast Cablevision of Mobile, Inc., *et al.* Civil Action No. CV96-000549, Mobile County Cir. Court; Pradat, *et al.*, v. Comcast Cablevision of Tuscaloosa, Inc. Civil Action No. CV96-520, Tuscaloosa County Cir. Court; Platt, *et al.* v. Comcast Cablevision of Dothan, Inc. Civil Action No. CV96-310, Houston County Cir. Court; Delpech, *et al.* v. Comcast Cablevision of West Florida, Inc. Case No. 96-2651, 12th Jud. Cir. Court, Sarasota Co.; Houser, *et al.* v. Comcast Cablevision of Tallahassee, Inc. Case No. 96-2538 2nd Jud. Cir. Court, Leon Co.; Fletcher, *et al.* v. Comcast Cablevision of Panama City, Inc. Case No. 96-1254, 14th Jud. Cir. Ct., Bay Co., Fla.

Section 623(a)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 543, states that

> [n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

Section 623 sets forth a comprehensive framework for the regulation of rates for basic cable service and for cable programming service ("CPS") tiers, pursuant to regulations adopted by the Commission. Basic rates of systems not subject to effective competition are subject to regulation by franchising authorities or, in certain circumstances in which the franchising authority is unwilling or unable to implement such regulation, by the Commission. CPS rates of systems not subject to effective competition are subject to regulation by the Commission if a franchising authority receives complaints from subscribers regarding such rates and, in turn, files a complaint with the Commission.[2] Basic and CPS rates of systems subject to effective competition are not subject to regulation, and rates for services provided on a per-channel or per-program basis are not subject to regulation regardless whether a system is subject to effective competition.

Cable television system franchises fees are established in municipal franchise agreements or through other local ordinances or statutes. The level of such fees is limited by Section 622 of the Communications Act.

The Commission's rules, which establish formulas and procedures for determining a system's maximum permissible rates for basic service and CPS tiers, specifically permit systems to pass through to subscribers the full amount of any franchise fees paid to franchising authorities. The Commission has made clear that rates for basic and CPS tiers may include pass-throughs of all franchise fees paid, including fees assessed on revenues obtained from sources other than the sale of basic and CPS service. The following question and answer appear in a *Public Notice,* Cable Television Rate Regulation Questions and Answers released May 13, 1993:

> Question: May any portion of franchise fees attributable to unregulated services be passed through to customers?
>
> Answer: The entire amount of franchise fees may be passed through to subscribers.[3]

Thus, the Commission's regulations and policies permit a cable television operator to pass through to subscribers all franchise fees which are attributable to both regulated and unregulated services.

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[2]Prior to enactment of the Telecommunications Act of 1996, a subscriber could file a complaint directly with the Commission. Today such complaints may be filed only by franchising authorities.

[3]Page 10, Question 31.

As is evident from the foregoing, the Commission regards questions relating to the propriety of such franchise fee pass-throughs as rate regulation matters. Rate regulation issues, as is reflected in Section 623(a)(1) of the Communications Act, are to be reviewed and adjudicated by franchising authorities and/or the Commission pursuant to the Commission's rate regulation standards and procedures. Under those procedures, systems subject to regulation must provide franchising authorities and the Commission with documentation that demonstrates that any pass-throughs of franchise fees have been properly calculated. Upon receipt of such documentation,

> [t]he franchising authority or the Commission, as appropriate, may then review the pass-through of increases in franchise fees and may order a prospective rate reduction and refunds in accordance with our rules in the event the operator has increased its *basic* service rates by more than the increase in franchise fees properly allocable to the basic tier . . . .
>
> Rate justifications relating to franchise fee-related increases in *CPS* tier rates will be reviewed by the Commission according to existing rules for Commission review of basic service tier rates.[4]

As the Commission has stated,

> the Cable Act of 1992 makes clear that regulation of the 'rates for the provision of cable service' is governed exclusively by the federal statute and Commission regulations. It therefore 'specifically preempts' state and local regulation which is inconsistent with the federal rules . . . where state law stands as on obstacle to the accomplishment and execution of the full objectives of Congress, the state law is preempted . . . .[5]

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[4] *Fourth Order on Reconsideration*, 9 FCC Rcd 5795, 5796 (1994).

[5] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226, 1265 (1994).

The Commission's rules and procedures, therefore, provide the exclusive means for determining whether franchise fees have been properly "passed through" and whether the resulting rates are permissible. State statutes, regulations and common law that have the effect of preventing cable systems from passing through and recovering franchise fees in their entirety in regulated basic and CPS rates that conflict with the rules and procedures adopted by the Commission are inconsistent with the framework set forth in Section 623 and have been preempted. *See Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 974 (1996).

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

2/21/02

Aldermen face showdown over Insight phone service

Officials may order Works Department to issue box permits

By BILL WOLFE
The Courier-Journal

A showdown is looming in the Louisville Board of Aldermen over efforts to expand Insight Communications' local telephone service into the city.

Months after Insight began offering phone service in Jefferson County, the cable company is still waiting for clearance to build its network in the city, where it needs permission to put power-supply boxes on about 200 spots in the public right of way.

Alderman Denise Bentley, president of the board, said it's only fair to grant the licenses because Insight pays the city $1 million a year in franchise fees for use of the right of way.

Plus, she said, the phone service that AT&T would provide over Insight's cable network would allow customers to save money over the rates charged by BellSouth.

"I have a lot of constituents who would love to save $10 a month," said Bentley, who believes the aldermen should tell Louisville's Public Works Department to issue Insight the permits to install the power-supply boxes.

But Alderman Barbara Gregg, chairwoman of the Louisville-Jefferson County Cable Commission, says the 4-foot-tall "green boxes" that Insight plans to install to provide back-up power for its phone service can be an eyesore and safety hazard, and they don't necessarily belong in the public right of way. The aldermen need to "make sure the community isn't inundated with these sitting in people's front yards," Gregg said.

Gregg said yesterday that she is open to an agreement with Insight. "At the same time, we're not going to give away the store."

An aldermanic committee voted Tuesday to introduce a resolution next week to require the works department to issue the permits.

That resolution is a reflection of the board's frustration with the department, Bentley said.

"Insight has worked over a year with the city in trying to access the rights of way, to try to enhance their service as well as introduce the phone service," she said. "They have run into a lot of obstacles on the city side.

"I've just been trying to get public works to understand that this is something we need to move forward with. If public works does not extend an olive branch and come back to the table between now and Tuesday . . . then we're forced into a resolution."

The works department "has not been very honest, in my opinion, through this process," Bentley said. "Every time I get to the table, it's something different."

Arguments that the boxes present a danger if hit by a car aren't valid, Bentley said, because the devices have automatic cutoffs for the natural gas-powered emergency generators inside.

"Whatever their hidden agenda is has really clouded the process," Bentley said.

"Yesterday was something of a slam-dunk against public works," Gregg said, adding that the department had unfairly "been put into the position of being the bad guy."

Bill Herron, city works director, issued a statement saying, "I'm doing my due diligence as an appointed official responsible for the public right of way. Public works will be meeting with representatives from Insight to develop a resolution we all agree upon that is in the best interests of both sides."

Gregg Graff, Insight's senior vice president of operations for the Louisville area, said "the time has come" for Louisville to issue the needed permits, and that it seemed that Insight and the works department were stalled.

"What it really came down to in the end was the issue of available space in the right of way," Graff said. "We have a right, the franchise that we have, to put our equipment in the right of way."

He said the works department wants to require that the Insight power boxes be at least 7 feet from the edge of roads, which would often put the equipment on top of a sidewalk or outside the right of way.

Insight wants to put its power boxes between the road and sidewalk, when possible. "The restriction really flies in the face of what we have a right to," he said.

Gregg counters that Insight's franchise doesn't give the cable service provider the rights it thinks it has. "It doesn't give them the right to do anything they want to do on our public's right of way," she said. "That franchise fee is not for these green boxes. These green boxes are for telephony. The franchise we have is for cable service."

Other companies, Gregg said, buy easements from property owners. "Why couldn't Insight do something like that?"

Gregg also said she doesn't trust Insight to work with property owners to find an agreeable placement for the boxes, and to landscape around them, as she said the company has promised.

"That is a total untruth, and I've got names of people that have called my office" to complain after the installation of a few boxes was approved last year. "That's how I first heard they were putting green boxes in, from the people who were having it forced down their throats," Gregg said.